In The Supreme Court of Bermuda

CIVIL JURISDICTION

2013: No. 288

PATRICK EARL EUGENE BEAN

Plaintiff

-v-

LLEWELLYN PENISTON

RULING ON APPLICATION TO STRIKE-OUT DEFENCE

(in Chambers)

Date of hearing: February 24, 2014
Date of Ruling: March 7, 2014

Christopher Swan, Christopher E. Swan & Co, for the Plaintiff
The Defendant appeared in person

Introductory

1. By a Specially Endorsed Writ issued on February 28, 2013, the Plaintiff sought $64, 074 as arrears of rent under an oral contract in respect of No. 5 Dariel Gardens, Long Bay Lane, Sandys ("the Property"). The Writ was served on the Defendant on Saturday March 9, 2013.

2. The Defendant was required to enter an appearance within 14 days of service of the Writ on him. He never entered an appearance. However, at 2.43pm on Monday March 25, 2014, he filed a Defence and Counterclaim. On March 26, 2013, the Plaintiff filed his Affidavit of Service and the original Writ.

3. On April 1, 2013, the Plaintiff filed a Search Praecipe and draft Judgment in Default. That same day, the Registrar entered Judgment in Default in favour of the Plaintiff for the liquidated sum of $64,070.00 with interest and costs.

4. On October 3, 2013, the Defendant issued a Summons seeking to set aside the Default Judgment:

    (a) on the grounds that the Default Judgment had only been served in September and a full Defence had been filed by mistake without an appearance;

    (b) in the interim, the Plaintiff had issued proceedings in the Magistrates' Court for possession of the Property;

    (c) the Plaintiff had a "laughable claim" as pleaded in the Defence; and

    (d) the Plaintiff was not even the owner of the Property. The Defendant's son was the true owner.

5. On the first return date of the Defendant's Summons in Thursday Chambers on October 24, 2013, I indicated that it seemed to me that the grounds for upholding the Default Judgment on purely procedural grounds were very weak. The real question which arose for determination was whether or not the Plaintiff could establish that the Defence was liable to be struck-out. I gave directions for the filing of evidence in relation to the Defendant's Summons on this basis.

Findings: was the Default Judgment a regular judgment?

6. I find that the Defendant filed his Defence and Counterclaim within the time limited for entering an appearance. Order 12 rule 5(a) of the Rules mandated entering an appearance within 14 days "after service" of the Writ. The Rules require counting time from the next day after service, with the result that the 14 day period expired on Saturday March 23, 2013. The Rules state that when time expires on a day when the Registry is closed, the time limit is extended to the next working day: Monday March 25, 2013, in the present case.

7. The relevant provisions of Order 3 on time state as follows:

> *"2 (1) Any period of time fixed by these rules or by any judgment, order or direction for doing any act shall be reckoned in accordance with the following provisions of this rule.*
>
> *(2) Where the act is required to be done within a specified period after or from a specified date, the period begins immediately after that date.*
>
> *(3) Where the act is required to be done within or not less than a specified period before a specified date, the period ends immediately before that date.*
>
> *(4) Where the act is required to be done a specified number of clear days before or after a specified date, at least that number of days must intervene between the day on which the act is done and that date. (5) Where, apart from this paragraph, the period in question, being a period of seven days or less, would include a Saturday or a public holiday, as defined in the Public Holidays Act 1947 [title 28 item 8], that day shall be excluded...*
>
> *4 Where the time prescribed by these rules, or by any judgment, order or direction, for doing any act at the Registry expires on a Sunday or other day on which the Registry is closed, and by reason thereof that act cannot be done on that day, the act shall be in time if done on the next day on which the Registry is open.*"

8. However, the Defendant failed to comply with the formal requirements for entering an appearance. The Defendant's failure to use the specified form was purely technical. The main function of entering an appearance is to signify that that a defendant intends to participate in the proceedings (Order 13 rule 1) and to furnish an address to which communications can be sent (Order 13 rule 3). The Defendant signed the document he did file. On the back-sheet of the Defence an address was furnished. The omission of the name of a firm of attorneys signified that the Defendant was acting in person.

9. So the Defendant failed to file the correct piece of paper; he filed a Defence and Counterclaim instead of a document in the form required by Order 13 rule 2, within the specified time for entering an appearance. However he met, within time, the substantive requirements relating to entering an appearance by signifying his intention of participating in the proceedings without an attorney and by providing his contact address.

In addition, he signified that (a) he wished to defend the action, and (b) had an arguable defence which he was willing and able to file well ahead of the time for so doing.

10. In England and Wales, the rules now require an Acknowledge of Service Form (including guidance notes), which is required to be served by a plaintiff together with the writ, to be returned duly completed to the appropriate court office by hand or by post. The essential requirements appear to be providing the key information required by the form (contact details and whether or not the defendant intends to defend the claim). The commentary to the 1999 White Book states at paragraph 12/3/5:

> "*The Court will do its best to give effect to an acknowledgment of service even if irregular…An acknowledgment with serious defects may have to be returned by the Court.*"

11. In the present case the Defendant filed a duly stamped Defence and Counterclaim which was placed on the Court file on the last day for entering an appearance. Looked at in that light, it seems obvious that the main purpose of the filing was to avoid being exposed to a default judgment being entered against him. He could perhaps have been requested by the Registrar to file a Memorandum of Appearance or to pay the additional filing fee attributable to a Memorandum of Appearance ($25), but there is no suggestion that this occurred.

12. It is true that the prescribed form of Memorandum of Appearance was not filed at all. It is entirely understandable that, in these extremely unusual circumstances, the Default Judgment, sought on the usual grounds that no appearance had been entered, was in fact signed. In my judgment, however, the Registrar ought to have advised the Plaintiff in response to his application for a Default Judgment that a Defence and Counterclaim had been filed and declined to sign the Default Judgment. A determination could in theory have been sought by the Plaintiff that the failure to file a Memorandum of Appearance in the correct form rendered the appearance, which was substantially entered in the form of the pleading, a nullity and that the Plaintiff was entitled to Judgment in Default.

13. However, it is inconceivable that any reasonable lawyer would make such an application. Because it is inconceivable that any reasonable court would deprive a defendant who had filed a full Defence, within the time limited for entering an appearance, of the right to defend the proceedings on the wholly technical ground that he had omitted to file another piece of paper which would add nothing of substance to the proceedings. At worst, a judge faced with such an application would, if feeling punctilious, direct the defendant to file a memorandum of appearance. A judge mindful of the spirit as well as the letter of

the overriding objective would, however, simply direct the 'delinquent' defendant to pay the filing fee in stamps which was avoided by failing to file the proper form.

14. Neither party addressed in their evidence one further irregularity which is potentially relevant to costs. Order 13 rule 4(2) required the Defendant to serve his appearance on the Plaintiff on the same date that he filed it in Court. If the Defendant had complied with this requirement by serving his Defence on March 25, 2013 on the Plaintiff, the Plaintiff ought not to have applied for Judgment in Default[1]. I will defer any findings on this issue until I hear counsel as to costs.

15. The above analysis may seem extremely generous and inclined to encourage flagrant breaches of the Rules. However, it is based on core legal principles found in the Rules themselves. What was the legal effect of the formal irregularities the Defendant was clearly guilty of? Order 2 rule 1 of the Rules provides as follows:

> "*(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.*
>
> *(2) Subject to paragraph (3), the Court may, on the ground that there has been such a failure as is mentioned in paragraph (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any steps taken in those proceedings or any document, judgment or order therein or exercise its powers under these Rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.*
> *(3) The Court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these rules to be begun by an originating process other than the one employed.*" [emphasis added]

16. Order 2 rule 2 provides:

[1] The Defendant deposed that the Registrar, on a date not specified, notified the Plaintiff that the Defence and Counterclaim had been filed.

"*2 (1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.*

(2) An application under this rule may be made by summons or motion and the grounds of objection must be stated in the summons or notice of motion."

17. A purely formal irregularity does not "*nullify any...document*" (Order 2 rule (2)(1)). Indeed, Order 2 rule 1(3) expressly provides that the commencement of proceedings by the using the wrong originating process is not, alone, a ground for wholly setting aside the proceedings. All instances of non-compliance with the Rules, including requirements expressed in mandatory terms, must be viewed through the prism of Order 2.

18. Obviously, the Rules themselves (in this case Order 13 rule 1) expressly provide that, where there is a failure to enter an appearance, a plaintiff may seek judgment in default. But in determining whether an appearance has been filed, Order 12 (1) ("*Mode of entering an appearance*") must in my judgment be read in conjunction with Order 2(2)(1). And that requires regard to be had not just to what the strict formal requirements of an appearance are, but also to what the substantive requirements and purpose of an appearance are as well.

19. I therefore find that the Plaintiff was not entitled to obtain Judgment in Default and that the Judgment obtained was an irregular one, one which, in all the circumstances of the present case, the Defendant is entitled to have set aside without regard to the merits. I accept (in the present factual matrix) the importance of distinguishing between regular and irregular judgments contended for by the learned editors of the *Supreme Court Practice 1999* at paragraph 13/9/8. This is, of course, subject to the reasonable time requirement in Order 2 rule 2 (1). The Plaintiff did not oppose the application to set aside on time grounds; the Defendant's evidence that he was not served with the Default Judgment until September was unchallenged.

20. It follows that the Defendant's application must be allowed and, subject to affording the Plaintiff an opportunity to strike-out the Defence presently filed, that the present action must proceed to trial based on the existing pleadings.

21. I have considered the issue of the regularity of the Default Judgment at such length because it is the only basis on which I would set the Judgment aside. Had I found the Judgment to be regular, I would have been obliged to consider the requirement that the

Defence had "*a real prospect of success*" or carried "*some degree of conviction*": *Supreme Court Practice 1999*, paragraph 13/9/18. It is difficult to attach much weight to the underlying merits of the initially pleaded defence. In the course of the present application, the Defendant all but formally abandoned his formally pleaded case in favour of an unarguable ownership challenge. If required to find that the Default Judgment was regular and properly obtained, I would have refused the Defendant's application to set it aside.

The Plaintiff's strike-out application

22. The bulk of the Defendant's First Affidavit in support of his application to set aside did not substantiate his filed Defence and Counterclaim. Instead it raised an additional case, barely hinted at in, his pleaded case that the parties had agreed that the Defendant could stay rent free in the Plaintiff's premises in return for legal services rendered. This was the assertion that the Plaintiff's son in fact owned the Property and the Plaintiff did not.

23. It is true that the Defence denies paragraph 1 of the Statement of Claim which avers that the Plaintiff is owner and landlord of the Property. But no positive plea that anybody else was the owner is made. Instead, paragraph 2 of the Defence in responding to the Plaintiff's case that an oral tenancy agreement was consummated between the parties merely states as follows:

> "*Paragraph 2 of the Statement of Claim is denied. The Plaintiff never entered into an oral contract to let the premises to the Defendant as alleged, indeed the Plaintiff executed a Sales and Purchase agreement with a third party on April 22nd, 2004.*"

24. The 'Counterclaim', which is in substance an elaboration of the Defence, is positively inconsistent with the case put six months later in the Defendant's First Affidavit. This part of the pleading avers as follows:

    (a) the Defendant was an attorney for the Plaintiff in relation to the development of which the property forms part;

    (b) "*it was always agreed with the Plaintiff, that in lieu of the legal services and expenses arising from services provided by the Defendant to the Plaintiff…that all such costs would be deferred and further, the Defendant would assist the plaintiff to reduce his loan obligations with his Bank.*"

25. The Defendant's pleaded case appears to be that the parties agreed that the Defendant could occupy the Property in lieu of being paid for services rendered although the Defendant would "assist the Plaintiff" to reduce his Bank loan.

26. The Defendant's Second Affidavit exhibited documents said to "*illustrate the true ownership of the property*" (paragraph 4). The Plaintiff's Affidavit understandably dealt mostly with the title to the Property issue. He only implicitly refuted the Defendant's pleaded case in answer to the rental arrears claim, and did not adduce any documentary evidence of a tenancy agreement between himself and the Defendant. An important concern was that Capital G Bank was likely to foreclose on his brother-in-law's property as the Plaintiff had used this property as collateral for certain debts the Plaintiff hoped would be funded by the Defendant's rental payments in respect of the Property.

27. The Plaintiff also deposed to the fact that he had commenced possession proceedings in the Magistrates' Court and obtained a possession order on June 7, 2013. A warrant of eviction was filed on June 14, 2013 but the Defendant obtained a stay after his son, J.A.L. Peniston Jr., filed an Affidavit in the possession proceedings claiming to own the Property. The Defendant's Third Affidavit exhibited more documents said to prove his son's ownership of the Property.

28. Submissions focussed on the ownership issue with Mr. Swan concerned to obtain a ruling that confirmed his client's title. On the issue of the tenancy agreement which formed the basis of the Plaintiff's claim for arrears of rent, the Defendant reminded the Court of the provisions of section 3 of the Conveyancing Act 1983 and the requirement for writing.

29. The Defendant declined an offer from the Court for an adjournment to afford him a further opportunity to adduce credible evidence of his son's alleged title to the Property as Mr. Swan's careful dissection of the documentary evidence made it clear that such credible evidence was lacking. The Defendant's son clearly entered into a sale and purchase agreement in relation to the property in April 2004. However, there is no or no credible evidence that the proposed sale was ever completed, let alone that the Plaintiff received the $600,000 sale price. All the circumstantial evidence points the other way.

Findings: is the Defence and Counterclaim liable to be struck-out?

30. The Defence is not liable to be struck-out altogether. It discloses an arguable defence, albeit a weakened one in light of the inconsistent alternative plea orally advanced in support of the application to set aside the Default Judgment. I am unable to find that, on the evidence presently before the Court, the defence is bound to fail. There is no written tenancy agreement before the Court, so oral evidence will be required to explain precisely on what terms the Defendant came to occupy the Property.

31. On the other hand, the absence of a written tenancy agreement is not fatal. Section 3 of the Conveyancing Act 1983 provides as follows:

> "***Contracts for the disposition of land to be in writing***
>
> *3 (1) No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged or by some other person lawfully authorized to act on his behalf.*
>
> *(2) This section shall not apply to leases or tenancies for terms not exceeding three years, nor shall it affect a contract when there has been part performance or sale by order of a court.*
>
> *(3) Any lease or tenancy in respect of which there is a right or option of renewal which if exercised would increase the term of the lease or tenancy beyond three years shall be deemed to be a lease or tenancy exceeding three years.*
>
> *(4) The law relating to part performance shall be interpreted in the same manner as it is interpreted in the courts in England.*"

32. Also of relevance are the following provisions of the Landlord and Tenant Act 1974:

> "***Rental period where no agreement in writing***
> *2 Subject to any agreement to the contrary evidenced in writing:*
>
> *(a) in every contract of tenancy existing on 31 December 1974 there shall be implied an agreement on the part of the tenant to pay the rent half-yearly in arrear; and*

(b) in every contract of tenancy entered into after 31 December 1974 there shall be implied an agreement on the part of the tenant to pay the rent monthly in advance.

Action for rent

3 Any person entitled under any contract of tenancy to any rent in arrear, may by action recover such rent from the tenant, whether or not the contract of tenancy is continuing."

33. One aspect of the Defence is liable to be struck out on the grounds that it is clearly unsustainable in factual terms: paragraph 2. Based on all the evidence before this Court, it is plain and obvious that it would be an abuse of process for the Defendant to maintain his denial of the fact that the Plaintiff was at all material times the owner of the Property. The plea is a frivolous one. It would, equally, be abusive for the Defendant to be able to pursue the obviously hopeless plea that his son is the true owner of the Property. The reference to the Sale and Purchase Agreement signed by his son in 2004 is wholly irrelevant, and should be should be struck out, accordingly.

34. I strike-out this aspect of the pleading under the inherent jurisdiction of the Court and/or under Order 18 rule 19(1) (b) and/or (d) of the rules.

35. In reaching this summary conclusion, I have regard to the overriding objective and the importance of deciding issues summarily wherever one properly can. I found it particularly striking that the Defendant could offer no vaguely plausible explanation as to why he did not plead in March the ownership dispute he raised in evidence in September. He was, by his own account, the lawyer for the property development and would certainly have known in March 2013 that his own son had purchased the property in or about 2004. I am bound to find that the challenge to the Plaintiff's status as owner of the Property was wholly lacking in substance; and wholly devoid of any connection with objective truth.

36. The finding of this Court on this issue is binding on the parties and it should not be possible for this issue to re-litigated, in the Magistrates Court.

Conclusion

37. The Defendant's application to set aside the Default Judgment succeeds. The judgment was irregular and he is entitled to that relief, in all the circumstances of the present case, as of right.

38. The Plaintiff's application to strike-out the Defence and Counterclaim altogether is refused. The Defendant has an arguable defence on the face of the pleadings, bearing in mind that the Plaintiff's claim is based on an oral contract. I was tempted to find that the pleaded defence is no longer viable in light of the bogus ownership dispute raised in the context of seeking to set aside the Default Judgment. On balance, there is no sufficient justification for such an approach and it could lead to an unjust result, in a case where it is not even clear that the Plaintiff would be able to obtain summary judgment.

39. However, paragraph 2 of the Defence is liable to be struck out (under the inherent jurisdiction of the Court and/or under Order 18 rule 19(1) (b) and/or (d) of the Rules). The relevant plea is frivolous and it would be an abuse of the process of this Court for the Defendant to be permitted to pursue his denial of the Plaintiff's ownership of the Property[2] any further.

40. I will hear the parties as to costs and the formal order to be drawn up to give effect to the present Ruling. However, with a view to encouraging the parties to agree the terms of the final order, which save as to costs should be uncontroversial, I will indicate my provisional view that there should be no order as to costs as each side has enjoyed a measure of success. The Defendant's application to set aside succeeded, and that was the only application formally before the Court. However, the issue addressed in evidence and in argument, the ownership of the property issue, was resolved in the Plaintiff's favour.

Dated this 7th day of March, 2014 _____

IAN R.C. KAWALEY CJ

[2] For the avoidance of doubt, these findings would not in any way be different if the legal ownership position were to be that the legal owner of the Property was a company wholly owned by the Plaintiff.